IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CL

No. 73-640

DWIGHT GEDULDIG,
Appellant,

vs.

CAROLYN AIELLO,
individually and on behalf of
all others similarly situated,
Appellees.

DWIGHT GEDULDIG,
Appellant,

vs.

AUGUSTINA D. ARMENDARIZ,
ELIZABETH B. JOHNSON,
JACQUELINE JARAMILLO,
individually and on behalf of all
other women similarly situated,
Appellees.

**Consolidated Cases on Appeal
from the United States District Court
for the Northern District of California**

MOTION TO AFFIRM

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MOTION TO AFFIRM

Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the final judgment and order of the Three-Judge Court

convened in the Northern District of California be affirmed on the ground that the question presented by Appellant is so unsubstantial as not to warrant further argument.

OPINION BELOW

The Three-Judge Court held unconstitutional the third sentence of California Unemployment Insurance Code § 2626. That sentence provides:

> In no case shall the term "disability" or "disabled" include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter. . . .

In the context of California's liberal disability insurance program the Court held that this provision creates a classification with no fair and substantial relation to the legitimate state purpose and therefore deprives women suffering from pregnancy-related disabilities of the equal protection of the laws. The opinion of the Court is reported. *Aiello v. Hansen*, 359 F.Supp. 792 (N.D. Cal. 1973).

QUESTION PRESENTED

Whether a statute denying disability insurance benefits to an otherwise qualified applicant therefor, on the sole ground that the applicant's disability is related to or caused by pregnancy or childbirth, violates the equal protection clause of the Fourteenth

Amendment to the United States Constitution, where the statute is part of a comprehensive state disability insurance scheme providing such benefits to individuals disabled for virtually any other reason.

STATEMENT OF THE CASE

Appellees challenge the constitutionality of California Unemployment Insurance Code §2626 insofar as the State's comprehensive disability insurance program singles out and excludes from coverage any disability which arises out of or in connection with pregnancy. The Three-Judge District Court ruled that the exclusion of pregnancy-related disabilities from the program violates the equal protection clause of the Fourteenth Amendment to the United States Constitution.

The context of this constitutional challenge is California's disability insurance program, one of few such programs in the nation which attempts to partially compensate individuals for wage loss due to disabilities not compensated by workmen's compensation laws. The program taxes all covered workers in order to finance benefits to "mitigate the evils and burdens which fall on the unemployed and disabled worker and his family." (Unemp. Ins. Code § 2601.)[1]

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[1]At the moment all workers are taxed one percent of their wages, up to a gross income of $8500. The limit on gross income taxable and the tax rate has varied on occasion, depending on the fiscal needs of the program. Benefit rates are structured so as to be quite progressive at lower income levels, i.e. workers with the lowest wages, who contribute least to the fund, receive more in benefits than they contribute. Unemp. Ins. Code §2655. Benefits

Pursuant to its compensatory purpose, the California disability insurance program pays benefits for a wide variety of disabilities. Benefits are paid for such common conditions as respiratory ailments, heart attacks, and broken bones, but also for disabling mental and physical conditions such as psychiatric disorders, obesity, alcoholism, drug addiction,[2] ailments caused by nicotine consumption, cosmetic surgery, attempted suicide, and even sex change operations. Sex-limited operations or conditions are also compensable, such as circumcisions, prostatectomies, and menopause.[3]

This all-embracing conception of compensable disability has been developed by Appellant pursuant to the governing statute, § 2626, which provides as follows:

> "Disability" or "disabled" includes both mental or physical illness and mental or physical injury. An individual shall be deemed disabled in any

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are thus related to contributions, but not proportionately. Neither weekly benefit amounts nor length of coverage (limited to 26 weeks in all cases) varies according to actuarial differences among covered workers. Rather, actuarial risks are all pooled, with benefits dependent only on previous income and length of disability.

[2]Benefits are paid to dipsomaniacs, drug addicts, and sexual psychopaths unless they are confined to an institution pursuant to commitment or court order. Unemp. Ins. Code §2678.

[3]Various statutory and administrative rules ensure that only those who are truly incapacitated from performing their regular work receive benefits. Claims must be accompanied by a doctor's affidavit attesting to the existence of the disability. Unemp. Ins. Code §§2627(d), 2708-2710. The individual must submit to such examinations as may be required by the appellant. Unemp. Ins. Code §2627(e). Appellant also maintains "yardstick" standards measuring the likely time duration of various types of disabilities, and may further investigate claims of unusual duration. In the absence of hospitalization, benefits are not paid until the eighth day of disability.

> day in which, because of his physical or mental condition, he is unable to perform his regular or customary work. In no case shall the term "disability" or "disabled" include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter.

The *only* disability which is not compensated by California's disability insurance program is that caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter.[4]

Given the purposes of California's disability insurance program, *and especially given the broad range of compensable disabilities in the California program,* Appellees challenged the singular exclusion of disabilities caused by or arising in connection with

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[4]Section 2626 has been amended, effective January 1, 1974, to provide benefits relating to pregnancy where the disability is caused by an abnormal and involuntary complication of pregnancy (Unemp. Ins. Code §2626.2, as added by Stats. 1973, C. 1026.) Benefits would not be available for injuries sustained "voluntarily", such as from the surgical operation known as an episiotomy, or for injuries sustained "normally", such as the open wound in the uterus caused by the separation of the placenta from the uterine wall, a wound which is healed by the process known as involution of the uterus. The amended version of §2626 is not before this Honorable Court. Appellees and the class they represent, including intervenors, have a continuing substantial monetary interest in invalidating the statute as it now reads. Nevertheless, it should be pointed out that many of the constitutional infirmities of the current statute have been continued in the amended version. Most of Appellees' arguments herein apply, therefore, with equal vigor to new §2626.2 as well as to current §2626.

pregnancy as discriminatory against women on the basis of their sex.[5]

In a closely reasoned opinion, the Three-Judge District Court rendered judgment, pursuant to F.R. Civ.P. Rule 54(b), holding the statute unconstitutional as prayed and enjoining its further enforcement.[6]

THE QUESTION IS SO UNSUBSTANTIAL AS NOT TO WARRANT FURTHER ARGUMENT

Appellant now claims that the District Court erred for two reasons: (1) that "normal pregnancy is substantially different from illness or injury"; and (2) that fiscal economy is a legitimate state purpose which may justify sex discrimination. The first of these arguments is unsubstantial in large part because it is irrelevant to the issues of this case. The second argument is unsubstantial because the issue has clearly

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[5]The *Aiello* case was filed in the United States District Court for the Northern District of California in July 1972. The *Armendariz* action was commenced in the California Supreme Court in August 1972 and was removed by Appellant to the federal forum soon thereafter.

The *Armendariz* appellees moved to stay proceedings pending state court resolution of their claims that the challenged statute violates the equal protection guarantees of the California Constitution (Cal. Const. Art. I, Secs. 11 and 21) and Article XX, Section 18 of the California Constitution, which prohibits employment discrimination on the basis of sex, as construed by the California Supreme Court in *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 95 Cal. Rptr. 329 (1971). The motion was denied. The *Aiello* and *Armendariz* actions were then consolidated in December 1972. Intervenor labor organizations were granted intervenor status in January 1973.

[6]The judgment did not adjudicate plaintiffs' motion for certification of the class, prayer for an award of attorneys fees, or claim for retroactive application of the judgment. These matters remain to be adjudicated.

been decided against Appellant in earlier decisions of this Court.

ARGUMENT

1. APPELLANT'S ARGUMENTS REGARDING "NORMAL PREGNANCY" ARE IRRELEVANT TO THIS ACTION AND IN ANY EVENT UNSUBSTANTIAL.

Appellant first declares the holding of the court below to be "that normal pregnancy shall be treated as an illness or injury" (Jurisdictional Statement, p. 8) and then shows that "pregnancy" is not an illness or injury, implying finally that Appellees seek "maternity benefits." The argument warrants no further consideration by this Court because it has nothing to do with this action.

The question faced by the court below was not whether normal pregnancy is or is not an illness or injury. Nor was the question of benefits for child rearing —maternity benefits—ever before the court. From the outset Appellees have contended only that disabilities *resulting from* pregnancy and childbirth must be treated like other disabilities now compensated under the California program. The court below so held.

These disabilities result from such pregnancy-caused injuries as damage to the tissues caused by surgical incisions for ectopic pregnancies, caesarian section delivery, and episiotomies; lacerations to the cervix and other parts of the vaginal tract caused by normal childbirth; and the wound to the uterus caused by separation of the placenta from the uterine wall during birth or miscarriage. Substantial hor-

monal imbalances resulting from delivery, which frequently result in disabling postpartum depression, and puerperal infection are examples of pregnancy-related illnesses which may cause inability to perform one's customary or regular work.[7] Appellant understandably submitted no evidence or testimony in the Court below to demonstrate that (1) such disabilities are not illnesses or injuries as those terms are applied in the California program or (2) such disabilities are distinguishable in any way from disabilities which are compensated by the California program.

The fact that pregnancy itself may not be a sickness or injury is not an issue.[8] Neither is the sociological study of pregnancy as a "sick role". The issue is not pregnancy, but pregnancy-related disabilities.

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[7]Any standard medical text describes all these pregnancy-related disabilities. See, for example, DeLee & Greenhill, *Principles and Practice of Obstetrics* (9th Ed. 1947), ch. 21; Kimbrough & Lull, *Clinical Obstetrics* (1954), ch. 25; Eastman & Hellman, *Williams Obstetrics* (13th Ed. 1966), ch. 17.

Williams Obstetrics, supra, for example, describes the separation of the placenta from the uterus in pertinent part as follows: "As separation proceeds, a hematoma forms between the separating placenta and the remaining decidua basalis." (*Id.* at p. 377.) *Williams* further describes first and second degree lacerations of the vaginal tract to be extremely common, stating that episiotomies are employed to minimize such lacerations. (*Id.* at 433.) The condition of the perineum after the surgical incision which constitutes the episiotomy is described as a "gaping wound." *(Id.)* Cervical lacerations are described in *Williams* at 921-924.

[8]Even if Appellant's point were relevant to this action, he certainly would not depend for his facts upon depositions taken in another, unrelated action. (See Jurisdictional Statement at p. 4.) The fact is that Appellant did not present *any* evidence below regarding physiologic aspects of pregnancy or pregnancy-caused disabilities.

The decision of the District Court in this regard was clearly correct. Construing the definitional problem of disability with respect to California practice, the Court found that the program "provides benefits to persons unable to perform their customary work because of nearly any physical or mental condition"; and "on account of nearly any incapacity." 359 F. Supp. at p. 794.[9] The Court then discussed the similarity of pregnancy-related disabilities to those now compensated:

> Pregnancy is clearly a unique human condition; only pregnancy can result in the birth of a child. For a woman, however, the effects of pregnancy and pregnancy-related illness are debilitating in much the same way as the physical and mental conditions that are included within the scope of the disability insurance program. 359 F.Supp. at p. 797.

Having found the only disabilities excluded from the program to be similar for purposes of the pro-

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[9]The first sentence of §2626 provides that "disability" includes mental or physical illness or injury. The second sentence, however, states that an individual is disabled when, *"because of his physical or mental condition"*, he cannot perform his customary work. (Emphasis added.) At oral argument on motions for summary judgment (e.g., RT 65, line 22 through RT 68, line 2 (Feb. 22, 1973)) and for a stay pending appeal (e.g., RT 28, line 7 through RT 29, line 3 (Sept. 6, 1973)), the court recognized the law to be unsettled regarding whether a compensable disability must be an injury or an illness or may also be a "condition". Appellant presented no points or authorities regarding proper statutory interpretation of this conflicting language. Appellees argued that the statute may be properly interpreted by analogy to those disabilities which are compensated under the program. Cosmetic surgery, obesity, menopause, and sex change operations are not usually thought of as "illnesses" or "injuries", but are compensable under the California disability insurance program when they prevent an individual from performing his customary or regular work.

gram to those included, the court looked to the test of the validity of classifications enunciated by this Court in *Reed v. Reed,* 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed. 225; whether the classification "rest(s) upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[10] (404 U.S. at 75.) Because pregnancy-related disabilities are not physiologically distinguishable from other compensated disabilities and because women disabled by labor and delivery or other pregnancy-related illnesses or injuries suffer from the same economic hardship as do other disabled workers, the court found the exclusion unrelated to the expressed legislative purpose of the act. (Cal. Unemp. Ins. Code, §2601.)

The finding that pregnancy-related disabilities are comparable to compensated disabilities is a factual determination based on the evidence before the lower court. Appellant raised no argument below to dispute this finding and does not do so here. The court's holding that the statute cannot withstand constitutional scrutiny represents a simple application of the *Reed* standard. Appellant agrees that this is the proper standard of review. This issue therefore presents no substantial question of fact or law which would warrant further argument before this Court.

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[10]The court refused to consider Appellee's claim that the statute must be regarded with "strict scrutiny" and could only be justified if necessary to a compelling state interest on the ground that the statute was invalid even under the less vigorous *Reed* test, citing *Eisenstadt v. Baird,* 405 U.S. 438, 447 n. 7, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972).

2. COST ALONE CANNOT JUSTIFY EXCLUDING PREGNANCY-RELATED DISABILITIES WHERE THERE IS NO RATIONAL BASIS FOR SELECTING THOSE PARTICULAR DISABILITIES TO CONSERVE FUNDS.

Having held that workers disabled by pregnancy-related disabilities were similarly situated to other disabled workers with respect to the stated primary purpose of the disability program, the lower court went on to hold that the exclusion of pregnancy-related disabilities failed to bear a fair and substantial relationship to the secondary purposes urged by the state as justification for the exclusion, as well.

Appellant urges first, that the additional costs of covering pregnancy-related disabilities justifies their exclusion; and, second, that the exclusion does not constitute sex discrimination because women on the average already receive more in benefits than they contribute to the program, whereas men receive less.

The Three-Judge District Court correctly rejected both arguments, holding that (1) the increased costs to the program of paying benefits for pregnancy-related disabilities did not justify excluding such disabilities from coverage, and (2) the fact that women as a class receive more benefits than they contribute is not a justification for discrimination in a program that does not determine contribution rates or eligibility for benefits on an actuarial basis.

a. Decisions of this Court and lower courts make clear that a monetary savings cannot alone justify discrimination on the basis of sex.

Appellant argues that it would cost more to provide coverage for pregnancy-related disabilities, and that

this additional expense justifies excluding such disabilities from coverage. The District Court correctly rejected these claims, stating that (1) the specter of increased costs cannot constitutionally justify an otherwise arbitrary and invidious classification; (2) Appellant has constitutional alternatives for reducing overall program costs; and (3) Appellant's bases for predicting large increases in costs are without sound foundation.

As the court below recognized (359 F.Supp. at 798), it is well settled that a state may protect the fiscal integrity of its programs, but not by making invidious distinctions between classes of its citizens. *Shapiro v. Thompson*, 394 U.S. 618, 633. Cost alone cannot render a classification rational.[11] In the instant case, as the court held, Appellant could rationally limit costs by excluding or limiting all claims in excess of certain amounts, but cannot exclude a whole class of disabled persons from coverage because of some stereotyped prediction that all pregnancy-

[11] *Jefferson v. Hackney*, 406 U.S. 535 (1972), cited by Appellant for the proposition that the fact certain groups are disadvantaged by legislation, taken alone, is not enough to establish an equal protection violation (Juris. Statement, p. 17, fn. 20), is in no way inconsistent with the holding of the Three-Judge District Court in the instant case. First, while that case is sometimes cited for the proposition that classes can be disadvantaged for purposes of saving money, *Jefferson* requires that the disadvantaged class must be selected on rational grounds. As discussed in the text no such reason exists in this case for singling out pregnancy-related disabilities to conserve funds. Second, *Jefferson* applies a less rigorous rational basis standard than does *Reed*, the controlling precedent in this sex discrimination case. (See pp. 9-10, *supra*.) The state cannot show a difference between pregnancy-related disabilities and the disabilities currently compensated bearing a fair and substantial relationship to the object of the legislation. (Pages 7-9, *supra*.)

related disabilities will be of inordinate length and expense. 359 F.Supp. at 799. While some claims by these workers will be large, others will not, contrary to stereotyped notions about pregnancy and childbirth. The state can limit all large claims, but it cannot single out a disability for which some claims may be large and preclude all such claims, large and small, from disability coverage. 359 F.Supp. at 798-800.

Under the circumstances, the exclusion of pregnancy-related disabilities is as irrational and invidious as the exclusion of indigent children from the schools to reduce education expenditures. See *Shapiro v. Thompson,* 394 U.S. 618, 633 (1969). There exists no distinguishing feature of pregnancy-related disabilities which would warrant singling those disabilities out for purposes of economy.

In so holding, the district court was merely following the precedent set in *Reed, supra,* and *Frontiero v. Richardson,* 411 U.S. 677, 93 S.Ct. 1764 (1973). The lower court in *Reed,* yielding to the argument that men on the average are better able to administer estates than women, upheld, in the interests of judicial efficiency, a provision of the Idaho Probate Code which preferred men over women in the administration of estates. This court reversed, holding that "to give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment . . ." *Reed v. Reed,* 404 U.S. 71, 75. Simi-

larly, in *Frontiero,* this Court rejected the Government's argument that it was cheaper and easier conclusively to presume that wives of male members of the military are financially dependent upon their husbands, while requiring that female members establish dependency in fact for purposes of obtaining certain housing and medical benefits. The Three Judge District Court in this case, as the Supreme Court in those, did not permit an exclusion from privileges or benefits based upon generalizations about women. As in *Reed,* the district court required that women disabled by pregnancy-related disabilities be permitted to obtain medical proof of their disability and become eligible for benefits on the same basis as all other disabled persons. Because the district court did no more than apply the relevant precedents with respect to the cost issue, that issue does not present a substantial question for review by this Court.

Finally, the court below correctly noted that Appellant's predictions of large increases in cost are without firm foundation.[12]

> Unfortunately, it is impossible to determine if the cost of including these disabilities is substantially greater than the costs of including other disabilities, because, according to defendant, no statistics are available indicating the cost to the program of paying benefits on account of various

[12]Even if Appellant's cost estimates were serendipitously correct, the District Court pointed out, the entire cost increase estimated by Appellant could be met by requiring workers to contribute an additional amount of approximately 0.364 percent of their salary, thus increasing the maximum annual contribution from $85 to $119 per year, an increase of approximately $2.80 per month for those in the highest wage bracket. (359 F. Supp. at 798.)

disabilities presently covered. (359 F.Supp. at 798.)[13]

More general information compiled by the federal government, however, indicates that both in terms of bed disability and restricted activity, such conditions as fractures, dislocations and sprains, influenza, upper respiratory conditions and viruses take a greater toll than deliveries and disorders of pregnancy and the puerperium. U.S. Department of Health, Education and Welfare, *Current Estimates from the Health Interview Survey* (1967), tables 3 and 4, pages 9 and 10. A copy of these tables is attached as Appendix A. Moreover, during the childbearing years, women show less than a day and a half more work loss than men

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[13]The state relies heavily on the fact that at the time California passed its statute, Rhode Island had included pregnancy in its disability program and had concluded that coverage for pregnancy-related disabilities was too expensive. Costs were high in that program because disabilities relating to pregnancy were not in fact treated like all other disabilities. Unfortunately, the board which administered the statute allowed pregnant women to collect benefits even for the period they were not actually disabled. In "Childbirth and Child Rearing Leave: Job-Related Benefits," 17 New York Law Forum 480, 485 (1971), Elizabeth Duncan Koontz, at that time Director of the Women's Bureau, U.S. Department of Labor, described the Rhode Island experience as follows:

> The Unemployment Compensation Board held that pregnancy . . . was . . . compensable under the law. Unfortunately, however, the board did not treat pregnancy like other physical conditions. Eligibility for benefits in cases of pregnancy did *not* depend on actual inability to work as required in the law, but was based upon the existence of the condition of pregnancy. In effect, any time a woman was not working during the entire period of pregnancy, regardless of the reason, she could draw benefits . . .

Under these conditions, high costs in the Rhode Island program were inevitable. In effect, Rhode Island gave pregnant women a special benefit, simply because they were pregnant and regardless of their physical condition. In the present case, pregnant women are not asking for special benefits, but merely for equal treatment during the period they are actually disabled.

per year, women missing 5.9 days work annually and men missing 4.5 days. (*Current Estimates, supra,* table 16, p. 22.)

In summary, then, Appellant presents no substantial question for review by this Court because (1) the law is settled that costs alone cannot justify the discrimination practiced by Appellant herein and, moreover, because (2) Appellant has failed to show either that costs for covering pregnancy-related disabilities would be great or that such costs would in any way differ or be greater than the cost of covering other disabilities.

b. Appellant's contention that no sex discrimination exists because women receive more in benefits than they contribute to the program does not merit review by this Court.

Appellant contends that women already receive more in benefits than they contribute in payroll taxes to the program, and that for this reason alone no sex discrimination can be said to exist. This argument first ignores the structure of the California program, which ensures that lower paid workers will receive more in benefits than they contribute. Cal. Unemp. Ins. Code §2655. Women earn about two thirds the wages that men earn. Therefore, although women constitute 40% of the California covered work force, they contribute only 28% of the program's funds. Significantly women receive less in benefits than their percentage of the work force would lead one to expect, receiving only 38% of benefits for their 40% of the work force. See *Aiello v. Hansen,* 359 F.Supp. at 800. The short answer to Appellant's argu-

ment, therefore, is that women receive a lesser percentage of benefits than their percentage of the work force, but that this statistic is just as irrelevant as that presented by Appellant.

Appellant's contention might arguably have merit if the state disability program based tax rates, benefits or coverage on actuarial considerations. But the program has never attempted to limit coverage on considerations such as age, occupation, previous health history or the statistical probability that certain illnesses or injuries will occur more frequently in certain age groups (e.g., the likelihood that men over the age of 55 will get heart attacks). The state therefore cannot selectively argue that such considerations justify the discrimination in this case.[14]

Stripped of the actuarial argument, case law requires that workers suffering from pregnancy-related disabilities be treated like all other disabled workers without regard to the fact that women on the average receive more benefits for their contribution than do men on the average.

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[14]In *Shapiro v. Thompson*, 394 U.S. 618 (1969), the court suggests in a footnote that state insurance programs may legitimately tie the amounts of benefits to the individual's contribution. Contrary to Appellant's footnote 19 (Jurisdictional Statement, p. 17), the Three-Judge District Court's decision deals directly with the *Shapiro* footnote. It states:

> Even if the state could constitutionally create a disability insurance program based upon actuarial data and tie the amount of benefits various groups would receive to the amount they contribute, the California disability insurance program is not such a program. Indeed, the program has a scale of benefits which is designed so that its likely effect will be that those earning small incomes will receive more in benefits than they contribute.
> (359 F.Supp. at 800.)

The lesson of *Reed* and *Frontiero* is that courts will no longer tolerate sex-averaging as a justification for discriminating against individuals or subgroups on the basis of sex. The obvious consequence of the refusal to allow sex-based generalization in both the *Reed* and *Frontiero* decisions was higher cost, in *Reed* to the courts and in *Frontiero* to the military. Yet this Court refused to permit cost to justify the discrimination.

Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971), a case decided under Title VII of the Civil Rights Act of 1964, is also instructive on this point. In *Phillips*, a woman sued Martin-Marietta Corporation for denying her a job under its policy against hiring women with preschool aged children. The Court of Appeals for the Fifth Circuit held that the failure to hire her did not constitute sex discrimination because 75 to 80 percent of the persons hired for the position she sought were women. This Court rejected the averaging argument, holding that the policy discriminating against the subgroup of women with preschool age children constituted sex discrimination under section 703 of the Civil Rights Act.

Thus, the resolution of this issue, like the resolution of the other issues raised by the Appellant, is dictated by established precedent and fails to present a substantial question for resolution by this Court.

CONCLUSION

While the question of how pregnancy should be treated in law and practice is an important one for

working women, the context in which it arises here presents no substantial questions of law requiring resolution by this Court. Appellant's contentions are either irrelevant to this case or have been decided against him previously by this Court. Appellant strains to render the issue of "pregnancy" relevant to this action by reference to cases involving private employers. But what is involved here is one state disability program, with its own unique purposes, history, and operation. The courts' narrowly-drawn opinion holds only that, within that program, the exclusion of pregnancy-related disabilities cannot be constitutionally justified.

For the foregoing reasons, the judgment of the Three-Judge District Court should be affirmed.

Dated, November 23, 1973.

Respectfully submitted,

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(Appendix A Follows)

[Data are based on household interviews of the civilian, noninstitutional population. The survey design, general qualifications, and information on the reliability of the estimates are given in Appendix I. Definitions of terms are given in Appendix II]

CONDITION GROUP	BOTH SEXES	MALE	FEMALE	BOTH SEXES	MALE	FEMALE
	DAYS OF RESTRICTED ACTIVITY IN THOUSANDS			DAYS OF RESTRICTED ACTIVITY PER 100 PERSONS PER YEAR		
ALL ACUTE CONDITIONS	1,455,088	638,154	816,934	752.4	684.6	815.4
INFECTIVE AND PARASITIC DISEASES	177,177	85,914	91,263	91.6	92.2	91.1
COMMON CHILDHOOD DISEASES	54,269	25,579	29,690	28.1	30.7	29.6
THE VIRUS, N.C.S.	79,628	34,894	44,734	41.2	37.4	44.6
OTHER INFECTIVE AND PARASITIC DISEASES	43,280	22,441	20,839	22.4	24.1	20.8
RESPIRATORY CONDITIONS	653,665	286,295	367,370	338.0	307.1	366.7
UPPER RESPIRATORY CONDITIONS	352,180	158,736	193,444	182.1	170.3	193.1
COMMON COLD	266,187	120,722	145,464	137.6	129.5	145.2
OTHER ACUTE UPPER RESPIRATORY CONDITIONS	85,993	38,014	47,980	44.5	40.8	47.9
INFLUENZA	241,622	99,708	141,915	124.9	107.0	141.6
INFLUENZA WITH DIGESTIVE MANIFESTATIONS	25,466	11,342	14,123	13.2	12.2	14.1
OTHER INFLUENZA	216,157	88,366	127,791	111.8	94.8	127.5
OTHER RESPIRATORY CONDITIONS	59,862	27,851	32,011	31.0	29.9	31.9
PNEUMONIA	29,441	12,694	16,547	15.2	13.6	16.5
BRONCHITIS	25,820	12,736	13,083	13.4	13.7	13.1
OTHER ACUTE RESPIRATORY CONDITIONS	4,602	2,221	2,381	2.4	2.4	2.4
DIGESTIVE SYSTEM CONDITIONS	67,964	31,251	36,712	35.1	33.5	36.6
DENTAL CONDITIONS	17,922	6,402	11,521	9.3	6.9	11.5
FUNCTIONAL AND SYMPTOMATIC UPPER GASTROINTESTINAL DISORDERS, N.E.C.	7,277	3,291	3,986	3.8	3.5	4.0
OTHER DIGESTIVE SYSTEM CONDITIONS	42,764	21,558	21,206	22.1	23.1	21.2
INJURIES	332,088	169,824	162,264	171.7	182.2	162.0
FRACTURES, DISLOCATIONS, SPRAINS, AND STRAINS	183,387	92,308	91,079	94.8	99.0	90.9
FRACTURES AND DISLOCATIONS	107,990	53,454	54,536	55.8	57.3	54.4
SPRAINS AND STRAINS	75,397	38,854	36,543	39.0	41.7	36.5
OPEN WOUNDS AND LACERATIONS	48,157	28,088	20,070	24.9	30.1	20.0
CONTUSIONS AND SUPERFICIAL INJURIES	45,569	19,100	26,468	23.6	20.5	26.4
OTHER CURRENT INJURIES	54,974	30,327	24,647	28.4	32.5	24.6
ALL OTHER ACUTE CONDITIONS	224,195	64,873	159,325	115.9	69.6	159.0
DISEASES OF THE EAR	31,134	15,665	15,438	16.1	16.8	15.4
HEADACHES	4,342	1,788	2,554	2.2	1.9	2.5
GENITOURINARY DISORDERS	34,431	5,298	29,132	17.8	5.7	29.1
DELIVERIES AND DISORDERS OF PREGNANCY AND THE PUERPERIUM	41,830	...	41,830	21.6	...	41.8
DISEASES OF THE SKIN	14,664	5,071	9,593	7.6	5.4	9.6
DISEASES OF THE MUSCULOSKELETAL SYSTEM	27,318	8,891	18,427	14.1	9.5	18.4
ALL OTHER ACUTE CONDITIONS	70,507	26,157	42,350	36.5	30.2	42.3

NOTE: N.O.S.—not otherwise specified; n.e.c.—not elsewhere classified.

TABLE 4. DAYS OF BED DISABILITY ASSOCIATED WITH ACUTE CONDITIONS AND DAYS OF BED DISABILITY PER 100 PERSONS PER YEAR, BY SEX AND CONDITION GROUP: UNITED STATES 1967

Data are based on household interviews of the civilian, noninstitutional population. The survey design, general qualifications, and information on the reliability of the estimates are given in Appendix I. Definitions of terms are given in Appendix II.

CONDITION GROUP	BOTH SEXES	MALE	FEMALE	BOTH SEXES	MALE	FEMALE
	DAYS OF BED DISABILITY IN THOUSANDS			DAYS OF BED DISABILITY PER 100 PERSONS PER YEAR		
ALL ACUTE CONDITIONS	611,158	264,635	346,523	316.0	283.9	345.9
INFECTIVE AND PARASITIC DISEASES	84,496	39,792	44,704	43.7	42.7	44.6
COMMON CHILDHOOD DISEASES	20,157	9,127	11,030	10.4	9.8	11.0
THE VIRUS, N.O.S.	41,872	18,163	23,708	21.7	19.5	23.7
OTHER INFECTIVE AND PARASITIC DISEASES	22,466	12,501	9,967	11.6	13.4	9.9
RESPIRATORY CONDITIONS	315,636	138,761	176,875	163.2	148.9	176.5
UPPER RESPIRATORY CONDITIONS	149,469	67,945	81,524	77.3	72.9	81.4
COMMON COLD	109,574	50,114	59,460	56.7	53.8	59.3
OTHER ACUTE UPPER RESPIRATORY CONDITIONS	39,896	17,831	22,065	20.6	19.1	22.0
INFLUENZA	132,857	55,203	77,654	68.7	59.2	77.5
INFLUENZA WITH DIGESTIVE MANIFESTATIONS	14,059	6,788	7,271	7.3	7.3	7.3
OTHER INFLUENZA	118,798	48,416	70,383	61.4	51.9	70.2
OTHER RESPIRATORY CONDITIONS	33,310	15,612	17,697	17.2	16.7	17.7
PNEUMONIA	16,936	8,138	8,799	8.8	8.7	8.8
BRONCHITIS	15,077	7,064	8,012	7.8	7.6	8.0
OTHER ACUTE RESPIRATORY CONDITIONS	*	*	*	*	*	*
DIGESTIVE SYSTEM CONDITIONS	33,287	16,021	17,266	17.2	17.2	17.2
DENTAL CONDITIONS	7,363	3,263	4,101	3.8	3.5	4.1
FUNCTIONAL AND SYMPTOMATIC UPPER GASTROINTESTINAL DISORDERS, N.E.C.	3,960	2,021	1,939	2.0	2.2	1.9
OTHER DIGESTIVE SYSTEM CONDITIONS	21,964	10,737	11,226	11.4	11.5	11.2
INJURIES	68,651	44,432	44,220	45.8	47.7	44.1
FRACTURES, DISLOCATIONS, SPRAINS, AND STRAINS	44,882	22,573	22,309	23.2	24.2	22.3
FRACTURES AND DISLOCATIONS	28,472	14,909	13,563	14.7	16.0	13.5
SPRAINS AND STRAINS	16,410	7,664	8,746	8.5	8.2	8.7
OPEN WOUNDS AND LACERATIONS	9,459	4,884	4,575	4.9	5.2	4.6
CONTUSIONS AND SUPERFICIAL INJURIES	13,456	5,302	8,154	7.0	5.7	8.1
OTHER CURRENT INJURIES	20,855	11,672	9,183	10.8	12.5	9.2
ALL OTHER ACUTE CONDITIONS	89,087	25,630	63,457	46.1	27.5	63.3
DISEASES OF THE EAR	10,665	5,223	5,457	5.5	5.6	5.4
HEADACHES	2,344	*	1,662	1.2	*	1.7
GENITOURINARY DISORDERS	17,198	3,324	13,874	8.9	3.6	13.8
DELIVERIES AND DISORDERS OF PREGNANCY AND THE PUERPERIUM	18,183	...	18,183	9.4	...	18.1
DISEASES OF THE SKIN	4,582	*	3,495	2.4	*	3.5
DISEASES OF THE MUSCULOSKELETAL SYSTEM	9,490	3,093	6,396	4.9	3.3	6.4
ALL OTHER ACUTE CONDITIONS	26,606	12,217	14,389	13.8	13.1	14.4

NOTE: N.O.S.—not otherwise specified; n.e.c.—not elsewhere classified.

TABLE 16. DAYS OF DISABILITY AND DAYS OF DISABILITY PER PERSON PER YEAR, BY SEX AND AGE: UNITED STATES, 1967

[Data are based on household interviews of the civilian, noninstitutional population. The survey design, general qualifications, and information on the reliability of the estimates are given in Appendix I. Definitions of terms are given in Appendix II]

SEX AND AGE	RESTRICTED-ACTIVITY DAYS	BED-DISABILITY DAYS	WORK-LOSS DAYS[1]
	DAYS OF DISABILITY IN THOUSANDS		
BOTH SEXES			
ALL AGES	2,953,202	1,109,428	406,00[illegible]
UNDER 17 YEARS	617,567	270,892	...
17-24 YEARS	231,201	100,551	59,142
25-44 YEARS	627,374	232,125	154,522
45-64 YEARS	831,531	282,447	170,043
65 & OVER YEARS	645,529	223,413	22,296
MALE			
ALL AGES	1,296,362	464,461	251,652
UNDER 17 YEARS	322,351	135,529	...
17-24 YEARS	89,337	35,399	30,937
25-44 YEARS	236,338	85,939	92,199
45-64 YEARS	390,735	126,285	113,303
65 & OVER YEARS	257,600	81,309	15,213
FEMALE			
ALL AGES	1,656,840	644,967	154,352
UNDER 17 YEARS	295,215	135,363	...
17-24 YEARS	141,864	65,151	28,205
25-44 YEARS	391,036	146,186	62,323
45-64 YEARS	440,796	156,162	56,740
65 & OVER YEARS	387,929	142,104	7,084
	DAYS OF DISABILITY PER PERSON PER YEAR		
BOTH SEXES			
ALL AGES	15.3	5.7	5.4
UNDER 17 YEARS	9.2	4.0	...
17-24 YEARS	9.9	4.3	4.2
25-44 YEARS	13.8	4.1	5.[illegible]
45-64 YEARS	[illegible]	[illegible]	[illegible]
65 & OVER YEARS	35.8	12.4	6.[illegible]
MALE			
ALL AGES	13.9	5.0	5.3
UNDER 17 YEARS	9.5	4.0	...
17-24 YEARS	8.3	3.3	4.[illegible]
25-44 YEARS	10.9	4.0	4.5
45-64 YEARS	20.6	6.7	6.7
65 & OVER YEARS	33.0	10.4	6.9
FEMALE			
ALL AGES	16.5	6.4	5.[illegible]
UNDER 17 YEARS	9.0	4.1	...
17-24 YEARS	11.2	5.2	4.[illegible]
25-44 YEARS	16.5	6.2	5.[illegible]
45-64 YEARS	21.3	7.6	5.[illegible]
65 & OVER YEARS	38.0	13.9	6.4

[1]Work loss reported for currently employed persons aged 17 years and over.